IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE T.R.RAMACHANDRAN NAIR

TUESDAY, THE 10TH APRIL 2007 / 20TH CHAITHRA 1929

WP(C).No. 31267 of 2004(V)

PETITIONER:

H.RAJESH, 'SIVADAM', CHEVAYUR P.O.,
KOZHIKODE.

BY ADV. SRI.S.P.ARAVINDAKSHAN PILLAY
SMT.N.SANTHA
SRI.K.A.BALAN
SRI.M.K.PRADEEPKUMAR

RESPONDENTS:

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1. ASSISTANT EXCISE COMMISSIONER,
WAYANAD, KALPETTA.

2. KERALA PUBLIC SERVICE COMMISSION,
REPRESENTED BY ITS SECRETARY, OFFICE OF THE
KERALA PUBLIC SERVICE COMMISSION, PATTOM,
THIRUVANANTHAPURAM-4.

3. DISTRICT OFFICER, KERALA PUBLIC
SERVICE COMMISSION, DISTRICT OFFICE,
WAYANAD, KALPETTA.

R2 & R3 BY ADV. SRI.P.C.SASIDHARAN, SC, KPSC
R1 BY G.P. SHRI P.A. SALIM GOVERNMENT PLEADER

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 21/3//2007, THE COURT ON 10.4.2007 DELIVERED THE FOLLOWING:

ORDER ON IA NOS.16698/04 & 14626./05

DISMISSED,

10.4.2007 SD/- T.R. RAMACHANDRAN NAIR, JUDGE.

APPENDIX

EXT.P1-TRUE COPY OF THE RELEVANT EXTRACT OF THE RANKED LIST

RESPONDENTS' EXTS:

EXT.R1(A)-TRUE COPY OF THE ORDER DATED 19.11.2001

EXT.R1(B)- DO. DATED 21.10.2005

EXT.R1(C)- DO. DATED 22.3.2004

EXT.R1(D)- DO. DATED 19.5.2004

EXT.R1(E)-DO. DATED 20.7.2004

EXT.R1(F)- DO. DATED 18.4.2002

EXT.R1(G)- DO. DATED 4.11.2003

EXT.R1(H)- DO. DATED 24.12.2003

EXT.R1(I)- DO. DATED 17.7.2004

EXT.R1(J)- DO. DATED 12.11.2004

EXT.R1(K)- DO. DATED 20.3.2006

// TRUE COPY ././

P.S. TO JUDGE

T.R. Ramachandran Nair, J.

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W.P.(C).NO.31267 of 2004-V

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Dated this the 10th day of April, 2007

JUDGMENT

The petitioner approached this court aggrieved by the non-reporting of existing vacancies of Excise Guards in Wayanad District, during the currency of Ext.P1 rank list. The rank list for appointment to the post of Excise Guards was published as per Ext.P1 by the Public Service Commission on 29.10.2001. The list expired on 31.12.2004. The petitioner is rank No.68 in the main list.

2. The petitioner points out in the writ petition that the cadre strength of Excise Guards in Wayanad District is 87 and since the existing number of such Guards is only 74, there were 13 vacancies to be reported. This court on 26.10.2004 by way of an interim order, directed the first respondent to report all the vacancies in the post of Excise Guard in the Excise Department in Wayanad Division to the third respondent within three weeks from that date. Thereafter, the first respondent filed a statement as directed by this court wherein the vacancy position was shown as 14. In the statement it was also averred that out of the 14 vacant posts, six posts are exclusively reserved for special recruitment of SC/ST candidates which are

already reported to the Public Service Commission, two posts are exclusively reserved for the posting of candidates in compassionate employment scheme and one post is kept vacant as per interim order dated 5.8.2002 in O.P. No.22210/2002. The balance five vacancies were reported to the Public Service Commission on 12.10.2004 and the District Office has advised five candidates as per letter No.WR.II(3)/493/91 dated 27.10.2004 and posting orders to these candidates will be issued shortly.

3. The petitioner thereafter filed I.A. No.16698/2004 for a direction to report 14 vacancies to the Public Service Commission. The apparent contention taken in the affidavit is that even if vacancies have been ear-marked for special recruitment and appointment under the compassionate employment scheme, vacancies need not be reserved anticipating their appointment. When the above I.A. came up for hearing on 3.12.2004, a learned single judge of this court passed the following order:

> "In continuation of the interim order passed on 26.10.2004, there shall be a further direction to R1 to report 14 vacancies of Excise Guards in Wayanad Division to PSC. This shall be done within two weeks from today. Candidates need not be advised from the rank list against the vacancies ordered to be reported without getting further orders from this court.
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> Post on 20.12.2004 for reporting compliance."

4. Thereafter, the petitioner filed I.A. No.14626/2005 praying to issue a direction to the first respondent to reserve 8 vacancies of Excise Guard which arose after 31.12.2004 for appointing special recruits and

candidates appointed under compassionate employment scheme and take steps to fill up the 8 vacancies that arose prior to 31.12.2004 by appointing candidates from Ext.P1 list. In paragraph 8 of the affidavit filed in support of the I.A., it was mainly contended that as there are enough vacancies to accommodate special recruits and candidates to be appointed under the compassionate employment scheme, there is no necessity to continue the reservation for them against the vacancies that arose prior to 31.12.2004. When the I.A. came up for hearing, this court passed an order directing the first respondent to file a counter affidavit in relation to the averments made in the affidavit. Accordingly, the first respondent has filed a counter affidavit on 6.12.2005. Subsequently, on 24.5.2006 the following order has been passed in I.A. No.14626/2005:

> "Heard.
> It is not in dispute that one vacancy of Excise Guard is available for filling up with PSC hand. Accordingly, the third respondent is directed to advise a candidate to one of the vacancies reported as per the interim orders of this court. The claim of the petitioner for advise to additional vacancies shall be considered at the time of final hearing. Post for hearing after two weeks. It is clarified that this interim order will not stand in the way of appointing candidates under the dying in harness or who are recruited as per special recruitment for SC/ST."

5. The Public Service Commission has filed a counter affidavit wherein it is stated that the petitioner was not advised as his turn for advice did not arise and as far as open category candidates are concerned, only

upto rank No.57 were advised for appointment.

6. When the case came up for hearing on 14.2.2007, the learned counsel for the petitioner argued for the position that going by the averments in the counter affidavit filed by the first respondent, there can be a direction to advise candidates from the rank list as it will not affect the rights of candidates appointed through special recruitment and under the dying in harness scheme. Since the details of the vacancy position from 29.10.2001 till 31.12.2004 and the vacancies which exist as on today which arose after 31.12.2004 were required to be made available, this court passed an interim order on 14.2.2007 directing the first respondent to furnish those details by way of an affidavit. On 26.2.2007 on behalf of the first respondent, an additional affidavit has been filed stating various details regarding the vacancy position covering the above periods and also producing various orders of appointments. A reading of the affidavit reveals the following facts:

7. As on 29.10.2001, the number of vacancies in the category of Excise Guards in the Division was 52 and out of these vacancies, five were set apart for special recruitment and were thus reported to the Public Service Commission. The remaining 47 vacancies were filled up by direct recruitment. These appointments were made as per Ext.R1(a) dated 19.11.2001. Ext.R1(b) is the order by which five vacancies have been filled

up by way of special recruitment on 21.10.2005. It is further stated that from 30.10.2001 to 31.12.2004, 35 vacancies of Excise Guards arose and out of these, three vacancies were filled up resorting to compassionate appointment which were made on 22.3.2004, 19.5.2004 and 20.7.2004 respectively (Exts.R1(c), R1(d) and R1(e)). Out of the remaining 32 vacancies, on 18.4.2002 17 vacancies were filled up by direct recruitment (Ext.R1(f). Out of these, four vacancies were N.J.D. vacancies of earlier period and the remaining 13 vacancies were vacancies which arose from 30.10.2001 t0 31.12.2004. Out of the 17 vacancies filled up on 18.4.2002, one N.J.D. vacancy arose which was filled up on 4.11.2003. Thus, all the 35 vacancies which arose between 30.10.2001 to 31.12.2004 have been filled up as pointed out earlier. From 1.1.2005 to 22.2.2007 31 vacancies arose and one special recruitment was effected on 20.3.2006 as per Ext.R1 (k) order. It is stated that 30 vacancies which arose after 31.12.2004, after the expiry of the rank list, are pending to be filled up.

8. Shri S.P. Aravindakshan Pillai, learned counsel for the petitioner argued that as far as the stand taken by the first respondent that six vacancies have been reserved for special recruitment under Rule 17-A of K.S. & S.S.R. and three vacancies for appointment under the compassionate employment scheme is concerned, as a matter of fact, those vacancies have been filled up only at a later point of time and therefore in

respect of those 9 vacancies which arose prior to 31.12.2004, the candidates included in Ext.P1 rank list ought to have been advised. Learned counsel pointed out that the word "reserved" has no special significance as far as special recruitment and appointment under compassionate employment scheme are concerned; there is no actual reservation as such and it is only to be ensured that at the time of appointment there are sufficient number of vacancies to appoint such candidates. It is therefore argued that the said method of appointment made at a later point of time cannot militate against the rights of candidates to be advised in the 9 vacancies which were reported pursuant to the interim order passed by this court prior to 31.12.2004.

9. In reply, Shri P.C. Sasidharan, learned counsel for the Public Service Commission and the learned Govt. Pleader pointed out that as far as reservation for special recruitment is concerned, those vacancies were actually reserved for them and hence they are not available for appointment from Ext.P1 rank list. This is so in the case of appointment under the dying in harness scheme. Mr. Sasidharan also pointed out that if petitioner and other 8 candidates are directed to be advised, it will be only in respect of vacancies which arose after 31.12.2004 which cannot be done and at any rate, those vacancies shall be filled up only by way of a fresh recruitment and if any such directions are issued, that will affect the rights of persons

who are expecting a fresh selection. He also relied upon the decision reported in **Jayachandran v. State of Kerala & others** (1984 KLN 102).

10. Therefore, the effect of Rule 17-A mainly arises for consideration. The said rule provides for special recruitment from among the Scheduled Castes and Scheduled Tribes. The rule reads as follows:

> **"17-A. Special recruitment from among the Scheduled Castes and Scheduled Tribes.-** Notwithstanding anything contained in these rules or in the special rules, the State Government may reserve a specified number of posts in any service, class, category or grade to be filled by direct recruitment exclusively from among the members of Scheduled Castes and Scheduled Tribes."

The Rule specifically provides that the State Government may "reserve a specified number of posts, to be filled up by direct recruitment exclusively from among the members of Scheduled Castes and Scheduled Tribes." This rule, as held by this court in various decisions, confers power to fill up posts by making special recruitment which is separate from and independent of the power available under Rule 14 of the K.S. & S.S.R. It is supplementary to the provisions in Rule 14. (**State of Kerala v. Sivadas -** 1979 KLT 678.) Later, a Full Bench of this court in **State of Kerala v. Sreekantan** (1993 (1) KLT 107) held as follows:

> "The wording of the Rule is categoric that a specified number of posts in any service, class, category or grade shall be reserved to be filled by direct recruitment exclusively from among the members of the Scheduled Castes and Scheduled Tribes. the Rule further provides that the above reservation is notwithstanding anything contained in the KSSR or in the Special Rules. The fact that special

recruitment can be made from among the Scheduled Castes and Scheduled Tribes notwithstanding anything contained in the Subordinate Service Rules or the Special Rules makes it clear that the direct recruitment contemplated under Rule 17A of the KSSR is to be made outside the purview of the provisions contained in the Subordinate Service Rules and the Special Rules. It is de hors and independent of the Special Rules. Though in common parlance special recruitment under R.17A is also a direct recruitment, it is not a recruitment as contemplated under the Special Rules. Special recruitment is confined to a category of persons, namely from among the members of the Scheduled Castes and Scheduled Tribes alone. The direct recruitment contemplated under the Special Rules is from the open market and it is not confined to any particular section of the public but from among the general public as a whole, though no doubt, reservation has to be made as provided for under Rules 14 to 17. The direct recruitment under Rule 17A differs from a direct recruitment under the Special Rules, for the former is confined to Scheduled Castes and Scheduled Tribes alone whereas the latter is open to all people. It is in independent recruitment not governed by the provisions of the Special Rules but to be made in accordance with R.17A. Even in cases where the appointment is to be made solely by transfer or by promotion alone under the Special Rules, the State Government is entitled to reserve a specified number of posts to be filled by special recruitment from among the Scheduled Castes and Scheduled Tribes under R.17A. This also is an indication that the special recruitment under Rule 17A is not an appointment under the Special Rules, but outside the same. The fact that for direct recruitment under the Special Rules a specified number of posts shall be filled by candidates belonging to the Scheduled Castes and Scheduled Tribes under Rules 14 to 17 will not make any difference, for Rule 17A is an additional provision for giving appointment to the members of the Scheduled Castes and Scheduled Tribes. In that view of the matter, even though special recruitment under R.17A is also by way of direct recruitment, it is distinct and different from the direct recruitment contemplated under the Special Rules and such special recruitment cannot be taken into account in fixing the quota of direct recruits as fixed under the Special Rules. Special recruitment under R.17A has to be treated as a separate category of direct recruits and it will be unfair to accommodate such special recruits exclusively in the quota earmarked for direct recruits. The number of special recruits will have to be deducted from the total

> number of vacancies and the ratio prescribed for direct recruits and promo tees under the Special Rules has to be applied for the remaining posts. Recruits under the Sports Quota or under the dying in harness scheme also stand on the same footing and such posts also cannot be taken into account in fixing the quota available to direct recruits under the Special Rules. The special recruitment under Rule 17-A, appointment under Sports Quota and appointment under the Dying-in-Harness Scheme stand outside the Special Rues. To determine the number of posts available for direct recruits and promotees/transferees under the Special Rules, the number of special recruits under the aforesaid three categories will have to be excluded and the ratio applied for the remaining posts."

Therefore, going by the above dictum, the number of special recruits will have to be deducted from the total number of posts so as to determine the number of posts available for direct recruitment. The said principle applies for appointment under the dying in harness scheme and also under the sports quota which also stands outside the special rules.

11. It is evident from the statement and the affidavits filed by the first respondent that six posts were exclusively reserved for special recruitment of Scheduled Castes and Scheduled Tribes candidates which were "already reported to the Public Service Commission" and two posts are exclusively reserved for posting of candidates under the compassionate employment scheme. It is clear from the statement filed on 18.12.2004 that even though there were 14 vacancies, five vacancies have been filled up on 27.10.2004 from the rank list Ext.P1 itself. Therefore, the remaining vacancies were only 9. It is evident from the affidavit filed on 26.2.2007 that as on

29.10.2001, i.e. the date of Ext.P1 rank list, the number of vacancies were 52 and out of which, five were set apart for special recruitment and reported to the Public Service Commission. Evidently one more was reported for special recruitment making the total to 6. The petitioner has no contention that the reservation of six vacancies for special recruitment for Scheduled Castes and Scheduled Tribes breaches the percentage of reservation provided in the rules. Therefore, going by the data available, 79 vacancies were filled up from the rank list between 29.10.2001 and 31.12.2004. The special recruitment has been made only in respect of six vacancies from the category of Scheduled Castes and Scheduled Tribes. Therefore, at any rate, it cannot be contended that the percentage of reservation has been exceeded at any point of time. The petitioner can succeed only if it is shown that either at the time of reservation of six vacancies for special recruitment of Scheduled Castes and Scheduled Tribes plus 2 vacancies for appointment under the compassionate employment scheme or at the time when the beneficiaries of such reservation were appointed, the percentage of reservation has been exceeded going by the total number of vacancies or by the cadre strength of Excise Guards in the District. Since the petitioner could not point out any breach of such percentage of reservation provided under Rule 14 of K.S. & S.S.R. either at the time of making the reservation or at the time of appointment of such candidates, there cannot be any

transfer of vacancies in favour of persons included in Ext.P1 rank list to accommodate them. Even though in the decision reported in **Babu v. Poulose** (2003 (2) LT 428) a Division Bench of this court held that the point of time the percentage has to be seen is the date of appointment and not on the date on which requisition is made to the Public Service Commission, it makes no difference here.

12. The vacancies presently existing are which arose after 31.12.2004. It is evident that the persons appointed under Rule 17-A under SC/ST categories and persons who were appointed under compassionate employment scheme, were appointed in vacancies which arose prior to 31.12.2004. Unless by any legally known method such vacancies are liable to be counted for direct recruitment from Ext.P1 rank list, no direction can be issued to advise candidates from Ext.P1 list as admittedly the existing vacancies arose after the expiry of the rank list going by the affidavit filed by the first respondent. It is true that as argued by the counsel for the petitioner, candidates could be directed to be advised from Ext.P1 to those nine vacancies even without disturbing the appointees under the special recruitment scheme and under the dying in harness scheme. But since the first respondent has taken a definite stand that those nine persons were appointed in vacancies reserved for them prior to 31.12.2004, no further vacancies are available to advise candidates from Ext.P1 prior to

31.12.2004. In 1984 KLN 102, it was held in paragraph 14 that direct recruits are entitled only to the posts available to them under the rules.

13. Counsel for the Public Service Commission invited my attention to Rule 2(12) of the definition clause in the K.S. & S.S.R. to point out that a candidate is said to be "recruited direct" to a service, class, category or post when, in case the appointment has to be done in consultation with the Commission, on the date of the notification by the Commission inviting applications for the recruitment, and in any other case, at the time of appointment. It is therefore contended that reservation of posts under Rule 17-A has to be considered at the point of time when the Commission invited applications for recruitment and not at the time of their appointment. Counsel for the petitioner disputed this position. Any way, in the light of the view that I have taken in the matter, it is not necessary to decide the scope of the said rule here. Rule 17-A clearly empowers the Government to reserve a specified number of posts "to be filled up by members of Scheduled Castes and Scheduled Tribes" and in this case also such reservation was made and they were reported to the Public Service Commission. Since there is no breach of the percentage of reservation provided in favour of Scheduled Castes and Scheduled Tribes in Rule 14(c) of the Rules, according to me, the petitioner cannot seek for transfer of vacancies so as to accommodate candidates from the ranked list Ext.P1.

Therefore, the writ petition fails and the same is dismissed without any order as to costs.

(T.R. Ramachandran Nair, Judge.)

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